

Our ref: FOI-2023-10121

22 December 2023

Emailed

Dear External Discloser

Freedom of Information request – Access refusal

1. I refer to your request of 22 November 2023 to this Office under the *Freedom of Information Act 1982* (FOI Act) for access to documents in the following terms:

Under the Freedom of Information Act 1982 (Cth), I request access to any and all reports setting out the “feedback”, noted by Mark Anstey in his decision notice of 12 December 2022, provided to the “Investigating Agency”, the Australian Public Service Commission.

Decision

2. I am an officer authorised under s 23 of the FOI Act to make decisions in relation to FOI requests.
3. Searches of our electronic case management system have located 1 document within scope of your request. Details provided in the Schedule of Documents at Attachment A.

Reasons

Material taken into account

4. In making my decision I had regard to the following:
 - the terms of your request
 - the content of the document to which you sought access
 - consultation response from another, relevant agency
 - advice from other, relevant Ombudsman officers
 - relevant provisions of the FOI Act, and
 - Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act, available at www.oaic.gov.au (FOI Guidelines).

Section 47E(d) – have a substantial adverse effect on the proper and efficient conduct of the operations of an agency

5. The document located and within scope of your request includes material containing the Office’s findings, comments and suggestions relating to an investigation, communicated to an agency under s 12(4) of the *Ombudsman Act 1976*.

6. The Ombudsman is an investigative agency involved in administering and enforcing the Ombudsman Act. Ombudsman investigations are dealt with in private pursuant to s 8(2) of the Ombudsman Act, and Ombudsman officers are to observe confidentiality with respect to information disclosed under the Act.
7. As noted in *Australian Broadcasting Corporation and Commonwealth Ombudsman* [2012] AICmr 11 (26 April 2012) ('ABC') at [33]:

"the Ombudsman Act establishes a framework within which the Ombudsman's investigations are conducted in private, and information disclosed or obtained under the Act is treated confidentially...Disclosure, under the FOI Act, of information provided to the Ombudsman by complainants in such circumstances would affect the willingness of people to make complaints to the Ombudsman in the future. That would have a substantial adverse effect on the proper and efficient conduct of the Ombudsman's operations"

8. Public detriment will arise if the Office is compromised in our ability to obtain confidential information in future Ombudsman Act investigations. Additionally, disclosure of our Office's findings following an investigation could reasonably be expected to have a substantial adverse effect on our ability to investigate in terms of affecting how agencies respond to us during an investigation. Release of information provided by agencies in the context of a private Ombudsman investigation could hinder our Office's ability to obtain information in future investigations.
9. I have considered the requirement outlined in s 11A of the FOI Act, that access must generally be given to a conditionally exempt document unless it would be, on balance, contrary to the public interest. In considering whether access would, on balance, be contrary to the public interest, I have considered the factors for and against disclosure, including the factors identified in s 11B(3) of the FOI Act. I have also considered the public interest factors favouring and against disclosure in the FOI Guidelines [6.17 – 6.22], as well as matters particular to the Ombudsman's functions and operating environment.
10. Disclosure may promote the objects of the FOI Act, including to:
 - a. Inform the community of the Government's operations, including, in particular, the practices followed by the Government in its dealings with members of the community.
 - b. Inform debate on a matter of public importance by allowing inquiry into possible deficiencies in the conduct or administration of an agency or official.
11. Factors against disclosure include:
 - a. Disclosure would reasonably be expected to prejudice the protection of an individual's right to privacy.
 - b. Disclosure would reasonably be expected to prejudice the proper and efficient conduct of investigations by the Ombudsman.
 - c. Disclosure would reasonably be expected to prejudice the Ombudsman's ability to obtain confidential information.
 - d. Disclosure would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.

12. Whilst disclosure may inform the community of Government operations and inform debate on a matter of public importance, those factors are outweighed by the risk posed to future investigations if the information is disclosed. Our Office relies on the full and frank disclosure and cooperation from other agencies in order to perform our functions and execute our powers. Our Office's ability to conduct investigations and obtain confidential information is paramount and therefore outweighs any factor for disclosure.

Section 47F - Personal privacy

13. In addition to the exemption noted above, the document also contains personal information, though I note for completeness those individuals have not been consulted as ultimately I have decided to not release the document.
14. Section 47F of the FOI Act conditionally exempts a document where "its disclosure would involve the unreasonable disclosure of personal information about any person." I must give access unless access would, on balance, be contrary to the public interest. (s 11A(5))
15. 'Personal information' is defined in section 4 of the FOI Act as:
information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.
16. The documents contain personal information in the form of names of individuals. I am satisfied that the relevant information is personal information: s 4 of the FOI Act.
17. In considering whether disclosure would be unreasonable, subsection 47F(2) of the FOI Act requires that I take into account:
 - the extent to which the information is well known
 - whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document
 - the availability of the information from publicly accessible sources, and
 - any other matter considered relevant.
18. The individual's referred to are not known to be associated with the document in scope of this request. Some aspects of the information, including some third party names, have been released previously in other documents. However, the information contained in the document is not publicly accessible as it relates to the findings of a private Ombudsman investigation.
19. I find that release of such information would involve the unreasonable disclosure of personal information under s 47F(1) of the FOI Act.

Public interest

20. In deciding whether access should be given to this information on the basis of public interest, I have taken into account the public interest factors for and against disclosure, s 11B(3) of the FOI Act, the FOI Guidelines at paragraphs 6.17 – 6.22, as well as matters specific to this agency's functions and operating environment.

21. I am not of the view that release of the personal information would inform the community of the Government's operations or inform debate on a matter of public importance. To the extent that one could argue that release did achieve those things, those factors are outweighed by prejudicing the protection of a person's right to privacy.
22. Pursuant to subsection 11A(5) of the FOI Act, I have concluded that this material is not required to be disclosed because disclosure at this time would be, on balance, contrary to the public interest.

Section 22 – Edited copy

23. The document within scope is a letter containing comments and suggestions to another agency under s 12(4) of the Ombudsman Act. I am of the view that s 47E(d) applies to the document in its entirety and therefore it is not practicable to provide an edited copy.
24. I have also had regard to the FOI Guidelines which discuss whether it is practicable to prepare an edited copy of a document under s 22 of the FOI Act the decision maker should consider whether editing would leave only a skeleton of the former document that would convey little content of substance. In which case, the purpose of the FOI Act may not be served by disclosing an edited copy and the document should be exempted in full.

Review rights

Internal review

25. Under s 54 of the FOI Act, you may apply in writing to our Office for an internal review of my decision. The internal review application must be made within 30 days of the date on which you were notified of my decision.
26. Where possible, please attach reasons for why you believe review of the decision is necessary. The internal review will be carried out by another Ombudsman officer within 30 days.
27. If you choose to seek an internal review, you will afterward have a right to apply to the Office of the Australian Information Commissioner (**OAIC**) for a review of the internal review decision.

Review by the Office of the Australian Information Commissioner

28. Under s 54L of the FOI Act, you may apply to the Office of the OAIC to review my decision. An application for review by the OAIC must be made in writing within 60 days of the decision date, either from the date of this letter or the date of our internal review decision letter. Your request can be lodged in one of the following ways:
 - online at oaic.gov.au/about-us/contact-us
 - via email to foidr@oaic.gov.au
 - by overland mail to GPO Box 5218 Sydney NSW 2001
 - in person to Level 2, 175 Pitt Street Sydney NSW

29. More information about the OAIC review process is available at its website:
[oaic.gov.au/freedom-of-information/foi-review-process](https://www.oaic.gov.au/freedom-of-information/foi-review-process)

Complaints to the Office of the Australian Information Commissioner

30. You may complain to the OAIC about action taken by the Ombudsman in relation to your FOI request.
31. While there is no particular form required to make a complaint to the OAIC, the complaint should be in writing and set out the reasons for why you are dissatisfied with the way your request was processed. It should also identify the Ombudsman's Office as the agency about which you are complaining.
32. You may lodge your complaint either:
- online at [oaic.gov.au](https://www.oaic.gov.au)
 - by overland mail to GPO Box 5218 Sydney NSW 2001
 - by email to enquiries@oaic.gov.au.

Contacts

33. You may contact me via email at information.access@ombudsman.gov.au or via telephone on 1300 362 072.
34. Please be advised the Office is closed for the holiday shut down period between 12pm (AEDT) on 22 December 2023 to 2 January 2024 and staff will be unable to respond to matters during that time.

Yours sincerely



Jodie Hanlon
Legal Team

Influencing systemic improvement in public administration

Schedule of documents – Freedom of Information Request FOI-2023-10121

Doc No.	Date	Pages/ Folio	Description of Document	Decision on access	Exempt or irrelevant material
1.	15 December 2022	8	Finalisation of investigation of a complaint	<i>Exempt in full</i>	Sections 47E(d), and 47F

